APPENDIX A

[Filed Oct 5, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35821
D.C. No. CV-98-00406-BLW

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SHOSHONE-BANNOCK TRIBES,
Intervenor-Appellant,

v.

FMC CORPORATION,
Defendant-Appellee.

ORDER

Before: HUG, Chief Judge, BRUNETTI, and GOULD, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Chief Judge Hug and Judge Gould have voted to deny the petition for rehearing en banc and Judge Brunetti so recommends.

The court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are

DENIED.

APPENDIX B

[Filed Jul. 07, 2000]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35821
D.C. No. CV-98-00406-BLW

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHOSHONE-BANNOCK TRIBES,
Intervenor-Appellant,

v.

FMC CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
For the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted June 6, 2000
Seattle, Washington

MEMORANDUM[1]

Before: HUG, Chief Judge, BRUNETTI, and GOULD, Circuit Judges.

The Shoshone-Bannock Tribes (the "Tribes") as intervenors appeal from entry of a consent decree between the United States and FMC Corporation that resolves claims that FMC violates the Resource Conservation and Recovery Act ("RCRA"). We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

FMC Corporation produces elemental phosphorus at a plant located on fee land within the Shoshone-Bannock Fort Hall Reservation. FMC has historically stored the waste from its plant in ponds. In September 1989 and January 1990, the plant became subject to RCRA regulation. *See* 42 U.S.C. §§ 6901 *et seq.*

In January, 1997, the United States contacted the Tribes' Land Use Commission, the Tribes' legal counsel, and FMC to advise them of the United States' intent to bring an action against FMC for violations of RCRA. At that time, the United States offered to negotiate a settlement of these claims. Although the Tribes were not a party to the suit, they were invited to participate in the negotiations, except those concerning the penalty to be paid by FMC to the United States for RCRA violations. The Tribes were consulted by the EPA in connection with the negotiations. They were provided with proposals and materials obtained from FMC as well as sampling results and drafts of the attachments to the consent decree.

In October, 1998, the United States filed a complaint against FMC simultaneously with the consent decree

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

resolving the claims. The Tribes were granted leave to intervene in May, 1999, at which time they filed an opposition to entry of the consent decree. After reviewing memoranda of law and affidavits from the United States and FMC in response to the Tribes' opposition, the district court approved the consent decree and entered it on July 13, 1999. The Tribes appeal that order.

This court reviews a district court's order entering a consent decree for abuse of discretion. *See United States v. Montrose Chemical Corp.*, 50 F.3d 741, 746 (9th Cir. 1995). This court cannot reverse the order unless the district court "committed a clear error of judgment by failing to apply the correct law or by resting its decision on a clearly erroneous finding of material fact." *Id.* In addition, a second layer of deference to the consent decree is due because a district court reviewing a consent decree signed by the United States on behalf of the EPA "must refrain from second-guessing the Executive Branch. Such deference is appropriate given [t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree." *Id.* at 746 (citations and quotation marks omitted).

The Tribes argue that the United States violated its trust duty to the Tribes. We disagree.

We have held that "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). RCRA is not aimed specifically at protecting Indian tribes, *see State of Washington, Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) ("RCRA does not directly

address the problem of how to implement a hazardous waste management program on Indian reservations."), and thus the United States does not have a specific trust duty to enforce RCRA on fee land within the Tribes' reservation. Moreover, the record disclosed a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC. The United States therefore satisfied its general trust duty to the Tribes. *See Morongo Band of Mission Indians*, 161 F.3d at 574.

We disagree with the Tribes' assertions of error. The Tribes contend that the FMC waste must be dredged and treated rather than capped in ponds. However, RCRA permits closure of waste ponds either by removing the wastes, or by leaving the wastes in place and installing a protective cap. *See* 40 C.F.R. § 265.228. The Tribes presented no evidence that the ponds must be closed under 40 C.F.R. § 265.312, which applies to landfills, rather than under § 265.228, which applies to surface impoundments. RCRA's Land Disposal Restrictions requiring treatment of the waste do not go into effect for FMC's plant until May 26, 2002, if FMC satisfies the requirements for a two-year extension. 40 C.F.R. § 268.5. Furthermore, the Tribes have presented no evidence that capping the ponds poses a threat to human health or the environment.

The Tribes cannot successfully assert that the specific Supplemental Environmental Projects were unreasonable because there are no existing federal air-pollution regulations currently enforceable against FMC.

While this court has indicated that the EPA should consult potentially affected tribes before taking action, *see State of Washington, Dept. of Ecology*, 752 F.2d at 1472, the EPA has clearly done so here.

None of the other legal grounds asserted by the Tribes show an abuse of discretion by the district court. To the contrary, the record contains ample grounds supporting the EPA's negotiated settlement and its approval by the district court.

WE AFFIRM.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF IDAHO

Civil No. 98-0406-E-BLW

UNITED STATES OF AMERICA,
Plaintiff,

v.

FMC CORPORATION,
Defendant.

ORDER

Before the Court is the application of Plaintiff United States for entry of the Consent Decree lodged on October 16, 1998. The Court has considered all filings made with respect to the application and concludes that the Consent Decree is fair, reasonable, in the public interest, and fulfills the United States' trust responsibilities to Intervenor Shoshone-Bannock Tribes.[1] The court will therefore approve the Consent Decree. A brief explanation of the Court's reasoning follows.

DISCUSSION

The United States brought this action against FMC under the Resource Conservation and Recovery Act ("RCRA"), codified at 42 U.S.C. §§ 6901 *et seq.*, to address the

---

[1] This includes the materials filed by Defendant FMC Corporation on June 4, 1999, in reply to Intervenor Shoshone-Bannock Tribes' opposition to the entry of the Consent Decree. The Court inadvertently entered conflicting orders as to the date such a reply would be due. The Court did, however, intend the June 4, 1999, deadline contained in the earlier order to be controlling. Thus, FMC's reply was timely.

treatment, storage, and disposal of hazardous wastes at FMC's elemental-phosphorus plant on the Fort Hall Indian Reservation near Pocatello, Idaho. The United States and FMC reached an agreement to settle the RCRA claims, which they embodied in a proposed Consent Decree lodged with the Court on October 16, 1998. The Shoshone-Bannock Tribes, inhabitants of the Fort Hall Indian Reservation, were later permitted to intervene for the purpose of opposing entry of the Consent Decree.

The essence of the Tribes' opposition to the entry of the Consent Decree is that it does not go far enough to address the environmental problems posed by FMC's operations. Specifically, they contend that (1) FMC should be forced to remove hazardous wastes stored in waste ponds instead of merely capping those ponds, (2) FMC should not be allowed an extended period of time to come into compliance with RCRA, and (3) the air-pollution control measures required in the Consent Decree are neither sufficiently protective nor sufficiently within the control of the United States. Based upon these perceived deficiencies, the Tribes argue that the United States' support of the Consent Decree is in conflict with its trust responsibilities to the Tribes. The United States agrees that it is bound by such trust responsibilities but disagrees as to their scope. Regardless of which view of the scope of the United States' trust responsibilities is correct, the Consent Decree satisfies those responsibilities.

A principle flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental-remediation measures the United States should pursue. In part for this reason, the United States' decision to agree to capping of the waste ponds is sufficient to fulfill its responsibilities to the Tribes. The Court is convinced that the capping requirements are adequately environmentally protective—the record contains no legitimate basis on which

the Court could conclude that capping allows an unreasonable health risk to go unchecked. Finally, the likelihood of procuring FMC's agreement to capping, thereby avoiding lengthy and costly litigation of uncertain result, was much greater than the likelihood of inducing FMC to agree to remove the wastes from the reservation. The capping requirements are therefore reasonable and in the public interest.

The Tribes also intimate that FMC should have been required to cease producing hazardous wastes while undertaking efforts to comply with the other terms of the Consent Decree. In other words, the Tribes appear to argue that the United States should have sought to shut down FMC's plant until FMC was able to construct on-site facilities to treat the wastes its everyday operations produce. It is difficult to see how such a draconian measure would be in the public interest. Hundreds of jobs would be lost at FMC alone and, because of FMC's prominent position in the phosphorus industry, phosphorus shortages on a national or international scale could be expected, negatively impacting many other industries. The United States' trust responsibilities to the Tribes do not require it to ignore the broader social and economic ramifications of its demands. It was reasonable for the United States to have agreed to allow FMC a period of time to come into compliance with RCRA, particularly since the period allowed is intended to track the time necessary for FMC to complete on-site waste-treatment facilities.

With respect to the air-pollution control measures, called supplemental environmental projects ("SEPs"), the Tribes' concerns are defeated largely by the fact that there are no existing federal air-pollution regulations enforceable against FMC. Thus, the United States could not have forced FMC to perform the SEPs, or more expansive air-pollution control measures, through litigation. Although FMC will eventually be subject to an enforceable regulatory scheme with respect

to air emissions, it was reasonable for the United States to accept as part of the RCRA settlement FMC's agreement to now begin efforts at curbing air emissions. While the SEPs agreed to may or may not be sufficiently far-reaching to satisfy the regulations to which FMC will eventually be subject, the circumstances make it very difficult for the Court to say that the United States was required to obtain more in order to settle its RCRA claims.

In sum, the Court concludes that the United States has fairly balanced the need to remedy the environmental damage caused by FMC and addressed by RCRA, the desirability of immediately requiring FMC to begin efforts at reducing its air-pollutant emissions, and its trust responsibilities to the Tribes against the delay, expense, and uncertainty of the litigation and the economic dislocation that would have come with seeking everything the Tribes demand. The Consent Decree is approved.

ORDER

In accordance with the views expressed above,

IT IS ORDERED that the settlement embodied in the Consent Decree is fair, reasonable, in the public interest, and fulfills the United States' trust responsibilities to the Shoshone-Bannock Tribes; the United States' motion for entry of the Consent Decree (Docket No. 4) is GRANTED. The Consent Decree is entered as an order of this Court.

DATED this 13th day of July, 1999.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT JUDGE